United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2382

To be argued by
ARTHUR E. McINERNEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

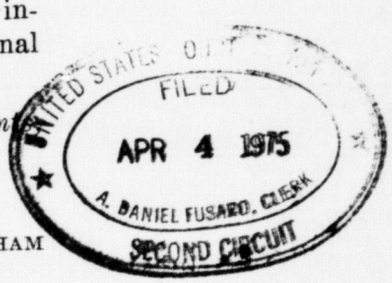
JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

against

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN, MARTIN SEGAL and LEON KARCHMER,

Defendants-Appellants-Appellees.



ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLEES-APPELLANTS

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PLAINTIFFS' REPLY

Reply to Karchmer

I

Mr. Karchmer says (his brief, p. 2*):

> "No one contends that the same counsel should have represented both the trustees and the Pension Fund."

But the same counsel did represent both. At least they claimed to have done so. Mr. Karchmer's counsel is claiming reimbursement for the services he rendered to the Pension Fund (61%) and for the services he rendered to Mr. Karchmer (39%).

The fact is that it was the individual trustees who were represented. Whatever representation the trust had was "purely coincidental and constituted no more than an insignificant fraction of the total services rendered" (Appendix II, p. 146a).

*References herein to "his brief" are to Mr. Karchmer's brief in answer to plaintiffs' main brief, which he has designated as "Reply."

II

Mr. Karchmer states (his brief, p. 9) that plaintiffs' argument that the trust did not need three separate, expensive lawyers to defend it "is a strange" one. There is nothing strange about this. The plaintiffs insisted and now insist that while the trustees may each have needed a lawyer, the trust needed one too. And that need should have been filled by one lawyer who had no conflicting position to maintain.

III

Mr. Karchmer has mistakenly claimed that plaintiffs did not insist below that a hearing was necessary on the issue of defendants' counsel fees (his brief, pp. 8-9). He says that question is now presented "for the first time."

That is not so.

That issue was squarely presented below in the following unambiguous language (Appendix II, p. 132a):

> "Should the Court grant the motions to reargue, or any of them, there must, I submit, be a hearing on these issues under the dictates of City of Detroit v. Grinnell Corporation (2d Circuit, March 13, 1974)."

This litigation, Mr. Karchmer claims, was not complex (his brief, p. 8) and he therefore argues that Grinnell should not apply.

If it were as simple as he claims, the trust should not be burdened with over $300,000 in legal fees for the defense of two trustees who were negligent and one trustee who recklessly disregarded his duties.

But simple or complex, a hearing is required by Grinnell.

IV

The order of July 6, 1970 applies to Karchmer as well as to all other defendants. Karchmer has made no contrary claim. He merely says in a footnote (his brief, p. 4) that Judge Bonsal did not think the order had been violated. In the face of the conceded facts, it is a mystery how Judge Bonsal could have arrived at that conclusion. Perhaps the explanation is that the July 6, 1970 order was made by him reluctantly and only after the mandate of this court had left him no alternative.

Reply to Segal

I

Mr. Segal, in arguing that he should have reimbursement of his attorney's fees, has conveniently overlooked the fact that this court on February 20, 1970 affirmatively declared

him (and his brother trustees) Section 501 fiduciaries and subject to the Landrum Griffin Act. Morrissey v. Curran, 423 F. 2d 393, 399-400 (2 Cir 1970); Appendix I, p. 1191a (opinion by Anderson C.J.):

> "Defendants also argue that the trustees of the Officers' Pension Plan do not come within the definition of those having a fiduciary responsibility as set forth in 29 U.S.C. §402(q). This court has specifically rejected this claim in Tucker v. Shaw, 378 F. 2d 304, 308 (2 Cir 1967). The trial court was correct in finding that all of the defendants were in a position of trust and responsibility in relation to the monies charged to have been unlawfully expended and all had a duty to see that it was restored to the Union treasury."

If there were any doubts about Mr. Segal's responsibilities before this court's first opinion (supra), there should have been none thereafter.

But Mr. Segal made no effort at any stage of these proceedings to recapture any of the monies unlawfully expended.

The district court found that the trustees had unlawfully paid out $371,271 (Appendix I, p. 1207a) but they did not lift a finger to see to it that one cent be returned. (See Appendix II, pp. 113-114a.)

To argue, as he now does, that his efforts were "in accordance with the Trust Agreement, and in defense of that Agreement" is specious. As a Section 501 fiduciary he had a clear duty to recoup the monies unlawfully expended. He had a responsibility to the membership of the National Maritime Union.

II

The Officers' Pension Fund is a separate union fund comprised 100% from the dues of union members. It was being used as a "slush fund" for persons who were not entitled to participate in it. Now that has been rectified. The excess money set aside for that unlawful purpose has now been returned to the general fund for legitimate union purposes.

But the fact remains that the plaintiffs achieved that end over the vigorous opposition of Mr. Segal.

It boggles the mind that Mr. Segal has the audacity to now say that his "attorneys' fees should be reimbursed in their entirety" (his brief, p. 2*).

III

Mr. Segal's statement that "Mr. Freedman's bill was not paid by the Pension Fund" (his brief, p. 7, footnote) is inaccurate and misleading.

Mr. Freedman's counsel Bloom and Epstein were paid from OPF to the tune of $85,829.11. Mr. Segal signed the checks payable to Bloom and Epstein. He knew they were Freedman's counsel.

*References herein to "his brief" are to Mr. Segal's brief in answer to plaintiffs' main brief, which he has designated as "Reply."

IV

Mr. Segal says there is "no basis for prolonging this already lengthy litigation" (his brief, p. 10). But it is he who has prolonged it (Appendix II, p. 113a). He was the one who refused to dispose of the matter and insisted on this appeal (Appendix II, p. 131a).

Reply to Freedman

I

Mr. Freedman does not claim that he was in a non-conflicting position with his client NMU; nor does he deny that his interest as a trustee and as an individual were in conflict; nor does he dispute that he was found "recklessly indifferent to his duties as trustee"; nor does he say that the July 6, 1970 order did not apply to him - but, he argues that he was justified in paying his counsel Bloom and Epstein $85,829.11 out of the OPF because they also did work beneficial to the OPF.

Mr. Freedman makes no reference to the sum of $7,059.84 paid to the Willkie firm out of the OPF to secure the opinion that 60% of the Bloom and Epstein bill to Freedman was properly payable by OPF.

He argues that the $29,611.49 paid to Judge Botein's firm for sub pro was proper because they were retained prior to the time Mr. Freedman had been held to have been "recklessly indifferent to his duties as trustee," and surcharged therefor (his brief, p. 13). That argument is specious. The fact remains that the great bulk of the work done by the Botein firm was after Freedman had been surcharged on October 26, 1972 (Appendix I, p. 122la). When Freedman finally paid the judgment of November 15, 1972 (Appendix II, p. 75a) (some fourteen months after its entry) on January 16, 1974 (Appendix II, p. 76a), quite obviously there was nothing more for Judge Botein to do. But just as obviously the work that had been done for all that time was for Mr. Freedman (our brief, pp. 18-19). His "chestnuts" were in the fire (per contra his brief, p. 13).

Can a lawyer operating under all those disabilities come to this court and with a straight face ask it to approve such payments for his benefit totaling $122,500.44?

To support his position, Mr. Freedman argues that his lawyers, Bloom and Epstein, "were the only counsel" to oppose the plaintiffs' claim for restoration of funds paid to and for the account of non elected personnel (his brief, p. 7). If that were so, then it is difficult to understand why he did not oppose the applications of Karchmer's lawyers and Segal's lawyers for any compensation at all on that phase of the litigation - or why he as trustee signed the checks in payment of those fees.

Surely if Freedman's statement (Appendix b; 2b-3b) is correct then Karchmer's lawyers and Segal's lawyers were wrong when they allocated their services and vice versa.

Once again this emphasizes the difficulty of having three separate sets of lawyers, all in conflicting positions, claiming to have done work for their fund.

In Yablonski v. United Mine Workers, 454 F. 2d 1036 (D.C. 1971) the Court said at p. 1042:

> "In sum, a sine qua non of permissible union representation in a Section 501 action is the absence of any duty to another that might detract from a full measure of loyalty to the welfare of the union."

Bloom and Epstein cannot meet that test. By Freedman's own admission they owed him a duty which necessarily detracted from the full measure of loyalty they owed the OPF.

Incidentally, the issue that Mr. Freedman (and the Willkie firm) considered of such value to the trust (his brief, p. 7) was a simple issue of law. That issue was whether or not persons who occupied positions of patrolmen, field patrolmen and agents though appointed and not elected were entitled to participate in the OPF. Plaintiffs argued they were not so entitled because of the holding in Wirtz v. NMU, 284 F. Supp 47 aff'd 399 F. 2d 544. That case required that elections be held for the positions referred to in accordance with Title 29 U.S.C. §481(a).

The defendants contended that the NMU Constitution

and the language in the OPF Plan and Trust Agreement sanctioned their inclusion. That contention prevailed.*

II

The statement (without a record citation) that Mr. Freedman paid counsel fees in the amount of $54,325.18 (his brief, p. 2 and again at p. 15) is not supported by the record.

Mr. Freedman was represented by Bloom and Epstein. Bloom and Epstein submitted two bills to Mr. Freedman: $51,803.37 (his brief, p. 8) and $56,709.56 (his brief, p. 11). These bills were directed to Freedman, not to the Trust. The first of these bills was paid in full by the OPF (his brief, p. 9). The second bill was paid 60% by the OPF (his brief, p. 12) and the balance of 40% or $22,683.82 was paid by Freedman personally (his brief, p. 12; Appendix II, p. 180a).

III

However respected and prestigious Willkie, Farr and Gallagher may have been, to seek their decision was not a prudent course (per contra his brief, p. 11). At that stage, the prudent

*Very incidentally (his brief, p. 9) Mr. Freedman has misstated the stipulations entered into on the original trial but those misstatements do not appear to be material here.

course would have been to seek Judge Bonsal's directive.

Moreover Freedman already had the opinion of Simpson Thacher & Bartlett on the subject - as unpalatable as that opinion must have been to him (see the "Dear Abe" letter, our brief, pp. 11-12).

IV

After this court's decision of February 20, 1970 instructing the District Court to act on plaintiffs' motion to enjoin the defendants "from retaining counsel paid or to be paid with union funds;" after the remand to the district court; after all the defendants' applications for rehearings and rehearings en banc from that decision had been denied by this court; after the district court order of July 6; after all the defendants' petitions for writs of certiorari from that decision had been denied by the Supreme Court; after the preparation of an accounting; and after plaintiffs contested the accounting, Mr. Freedman continued to act as attorney for Curran, Wall, Perry and Freedman and continued on his retainer with NMU. But now Mr. Freedman boldly states (his brief, p. 6) that "after lengthy discussion with the Court," he "decided to

retain separate counsel" (his brief, p. 6, citing Appendix I, p. 1045a) (emphasis added).

The reference is to a hearing on September 22, 1970 - two months after the July 6, 1970 order (and seven months after the decision of this court remanding that issue to the district court).

At that hearing the district court said (Appendix I, p. 1034a):

> "THE COURT: My first problem, gentlemen, is rather a serious one. There was an order entered here that the defendants are enjoined from employing counsel paid or to be paid with union funds. This Court retained jurisdiction. As I look at this accounting, Mr. Freedman, (prepared by the Freedman office and submitted over his signature) I think there is a real conflict of interest here because if there's anything to what the plaintiff says, the union should be trying to get this money back, and you represent the union and you are saying that whatever the union paid out was all right.
>
> "Now, I think there's a real conflict of interest there, not only as to Mr. Perry but as to the other defendants."

And at page 1035a:

> "MR. FREEDMAN: I appreciate your Honor's sentiments, but I would say that so far as I am concerned and my associate - my associate and I have to be regarded as the same, I will admit - we have no financial interest in this one way or the other.
>
> "THE COURT: It doesn't matter. You are getting a retainer from the union."

And at page 1036a:

> "THE COURT: On the issues that are here, I do feel very strongly that there is a conflict of interest here and I do think you ought to comply with this order. It doesn't really matter that you feel there is no conflict. I rather think there is."

And at page 1039a:

> "THE COURT: I think we ought to comply with the order that was filed here of July 6, 1970."

And at page 1044a:

> "THE COURT: I forgot you were a trustee*, Mr. Freedman. I am afraid that is another conflict of interest. I am afraid it is because the interests of the union and the trustees are not necessarily synonymous.
>
> "I really would put that as the first priority, the matter of independent counsel, and we will follow along along the lines that we talked about today." (parenthetical material added)

But Bloom and Epstein were the only counsel to appear for Freedman, Curran and Wall.

V

Mr. Freedman (his brief, pp. 4-5) states:

> "Mr. Freedman was represented by his own law firm in the Phase I and Phase III proceedings, as well as in connection with the filing of his petition for a writ of certiorari in Phase II. No charges have been made or bills submitted for the latter services either to the trust fund or to the National Maritime Union of America."

However, Mr. Freedman and his firm were on a retainer, of $50,000.00 a year, from NMU and received additional substantial fees from related entities such as the NMU Pension and

*At this hearing plaintiffs' had assumed that Messrs. Karchmer and Segal were complying with the district court's order of July 6, 1970 and were paying their counsel from their own funds.

Mr. Segal would indicate that plaintiffs soon thereafter had contrary information through answers to interrogatories served in October, 1970 (Segal reply brief, p. 5, footnote). But that is not so either. Those answers showed that Simpson, Thacher and Bartlett had been paid $5,764.13 out of the OPF (Appendix I, p. 116a). Plaintiffs assumed that that payment had been made for their services to Karchmer and Segal as trustees prior to the July 6, 1970 order and that thereafter all bills would be rendered to and paid by the individuals. That assumption was reinforced when Karchmer retained a separate lawyer to represent him.

Welfare Fund. So his admitted representation of himself was not only in conflict with the interests of his client (plaintiffs' brief, p. 17), but in violation of the order of July 6, 1970 and the services rendered after January 15, 1973 were in violation of the order entered on that date (plaintiffs' brief, p. 17) as well as in violation of the July 6 order .

VI

NMU did pay Judge Rifkind's firm a fee at about this juncture which was labeled in the National Office minutes for the "Wimbush suit" (Appendix II, p. 145a). Because of this the plaintiffs are dubious of the accuracy of Mr. Freedman's statement (his brief, p. 5) that he personally paid the entire fee to Judge Rifkind.

Should a Grinnell hearing be required the plaintiffs would seek "the production of documents and related testimony on the payment of union funds to the Rifkind firm subsequent to the Freedman appeal" (our brief, p. 27).

The plaintiffs requested, but did not receive, the Paul Weiss Rifkind Wharton & Garrison bills to NMU and the cancelled checks in payment thereof (Appendix II, p. 145a and p. 211a). Those documents will be vitally relevant on a Grinnell hearing.

The haunting doubt lingers: "Was the Rifkind firm bill allocated like the Bloom and Epstein fee?" Plaintiffs of course have no way of knowing without the production of the documents sought.

VII

Finally, Mr. Freedman does not even address himself to the serious charges leveled against him by Mr. Perry (plaintiffs' brief, p. 19 footnote).

Those charges, if true, may warrant more severe sanctions than the imposition of mere money damages.

Reply to Curran and Wall

I

Messrs. Curran and Wall were represented by Bloom and Epstein. Bloom and Epstein were paid $85,829.11 from union funds (Appendix II, p. 110a).

Curran and Wall were defendants and were enjoined from employing counsel "paid or to be paid with union funds" (Appendix II, p. 61a). Their representation by Bloom and Epstein was in violation of the July 6, 1970 order since Bloom and Epstein

clearly were counsel paid with union funds. Neither Curran nor Wall claim to have paid personally any part of the Bloom and Epstein fee.

The mandate of this court and the order of July 6 were based on the predicate that the plaintiffs had made a prima facie case and that, in that view, the union should not bear the cost of defending the action.

II

Curran and Wall argue (their brief, p. 2) that "they would be entitled to payment by the union of their legal fees." In view of the fact that there is no proof in the record that they paid one penny of counsel fees, this is a strange argument indeed. It must be assumed that they make this argument to soften their disobedience of the July 6, 1970 order, with respect to the Bloom and Epstein representation of them (supra).

If they are correct, no such fees could be paid until after a Grinnell hearing.

Curran and Wall, although not surcharged, were not without fault in discharging their duties as 501 fiduciaries (per contra their brief, p. 2).

This clearly appears from the opinion of the District Court of October 26, 1972 (Appendix I, p. 1223-1224a).

"Curran, President of NMU, had a fiduciary responsibility under Section 501(a) of LMRDA (29 U.S.C. §501(a)) with respect to the funds of NMU. For the purposes of Section 501(a), the funds paid by NMU to the Officers Pension Plan and by it to Perry were funds of NMU. Curran negotiated the Perry employment contract and signed it on behalf of NMU, and had also signed the Agreement and Declaration of Trust. Although he dismissed plaintiffs' request as propaganda, Curran knew that the plaintiffs had requested NMU to institute this action to recover monies paid to the Officers Pension Fund for the account of non-officers on the ground that such payments violated the NMU constitution, and that it was charged that Perry was a non-officer. Curran was in a position of trust to expend NMU funds only in accordance with the NMU constitution. Curran also knew or should have known that the Agreement and Declaration of Trust did not authorize the pre-payment of contributions to the Officers Pension Plan. Nevertheless, on December 18, 1968, when he fired Perry for the first time, he instructed Breit to prepare a check from NMU funds in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account, and on the following day he signed the check, which was then forwarded to the Officers Pension Plan. However, the $41,250.01 has been recovered by NMU, so that even if he violated his fiduciary duty, there is no occasion for sur-charging him in this amount.

***

"The evidence indicates that Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry. Karchmer testified, "Well, to go in to Joe (Curran) is a very fearful process."

Mr. Wall had a duty to take action upon receipt of plaintiffs' request (supra) in May of 1968. Had he done so, there would have been no payment to Mr. Perry on January 16, 1969 and the hundreds of thousands of legal expenses charged to the union would have been saved (Appendix I, p. 1224a).

"Wall, Secretary-Treasurer of NMU knew that plaintiffs had requested NMU to institute action to recover monies attributed to the Officers Pension Plan with respect to non-officers. Indeed, he testified that he brought this to the attention of Curran and the NMU lawyers."

But he did nothing to stop the payment of $222,200.00 to Mr. Perry.

III

The effect of the dual relationship of each of the attorneys for the defendants cannot better be stated than in the language of Justice Aulisi in Hasbrouck v. Rymkevitch (Third Dept), 25 A.D. 2nd 187, 1966 at p. 188-189:

"It is fundamental that an agent cannot take unto himself incompatible duties, or act in a transaction where he represents a person having an adverse interest. Where he does act for adverse interests he must necessarily be unfaithful to one or the other as the duties which he owes to his respective principals are conflicting and incapable of faithful performance by the same person. No man can serve two masters (2 N.Y. Jur., Agency, §203; Lamdin v. Broadway Surface Adv. Corp., 272 N.Y. 133; Elco Shoe Mfrs. v. Sisk, 260 N.Y. 100, 103; Klein v. Twentieth Century-Fox Int. Corp., 201 Misc. 132, affd. 279 App. Div. 989). The rules apply irrespective of good or bad faith and it is quite immaterial that there may have been no intention to defraud (Carr v. National Bank & Loan Co., 167 N.Y. 375, affd. 189 U.S. 426; Matter of People [Bond & Mtge. Guar. Co.], 303 N.Y. 423, 431). As Judge Rapallo long ago said in Bain v. Brown (supra, pp. 288-289): "When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the

honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it."

Conclusion

For the reasons discussed above and in plaintiffs' main brief, it is respectfully submitted that the order appealed from should be modified in accordance with the prayer contained in the conclusion of plaintiffs' main brief.

Respectfully submitted,

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By _____
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AFFIDAVIT OF SERVICE BY MAIL

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella , being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 E. 17th Street, Brooklyn, New York, 11230
That on April 4, 1975 , she served 3 copies of Reply Brief of Plaintiffs-Appellees-Appellants
on

SIMPSON, THACHER & BATLETT, ESQS.,
ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK.

BROMSEN, GAMMERMAN ALTIER & WAYNE, ESQS.
450 SEVENTH AVENUE
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HERMAN E. COOPER, ESQ.,
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NEW YORK, NEW YORK

STANLEY B. GRUBER, CHARLES SOVEL, ABRAHAM E. FREEDMAN, ESQS.,
346 WEST 17th STREET
NEW YORK, NEW YORK

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Rose Rinella

Sworn to before me this
4th day of April , 19 75

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 19 77